

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
MARCH 2000 Session

EWIN BUSH, ET AL. v. TONY WESLEY CARRICK

**Direct Appeal from the Chancery Court for Bedford County
No. 17,949; The Honorable Tyrus H. Cobb, Chancellor**

No. M1999-01236-COA-R3-CV - Filed August 9, 2000

This case involves the alleged fraudulent transfer of the proceeds from a certificate of deposit. In the trial court, the plaintiffs sought the imposition of a constructive trust over improvements to property built with the funds. The Chancery Court of Bedford County ruled that the plaintiffs had failed to carry their burden of proof and rendered judgment in favor of the defendant.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which FARMER, J., and LILLARD, J., joined.

Allen Shoffner, Shelbyville, for Appellants

Tamra L. Smith, Shelbyville, for Appellee

OPINION

Ewin Bush and William Gibson appeal from the judgment of the Chancery Court of Bedford County. For the reasons stated herein, we affirm the trial court decision.

I. Facts and Procedural History

The named plaintiffs in this case, Ewin H. Bush and William F. Gibson (“Appellants”), are the co-administrators of the estate of Lonnie Mae Lane. The defendant, Tony Wesley Carrick (“Defendant”), was the administrator of the estate of Harvey Wesley Carrick. The defendant is also the son of Harvey Carrick.

From January 5, 1978 until July 9, 1985, Lonnie Mae Lane resided in the home of Harvey Carrick. Mr. Carrick died intestate on March 29, 1987, and the Defendant was subsequently appointed administrator of the estate. On June 8, 1987, Lonnie Mae Lane filed a claim against the estate of Harvey Carrick alleging that she had rendered personal services for him during the time she

resided in his home.¹ On April 23, 1991, after an evidentiary hearing, the Chancery Court of Bedford County awarded Lonnie M. Lane a judgment against the estate in the amount of \$19,500.

On June 18, 1991, the Defendant filed a Notice of Insolvency in the estate of Harvey Carrick, and the court subsequently declared the estate insolvent. On June 18, 1992, the administrators of Ms. Lane's estate filed a complaint against Tony Carrick in his individual capacity and as administrator of his father's estate. The complaint sought to set aside certain conveyances of land from Harvey Carrick to Tony Carrick which, the plaintiffs claimed, had rendered the estate of Harvey Carrick insolvent. The trial court eventually dismissed the complaint, finding that the plaintiffs had failed to establish by a preponderance of the evidence that Harvey Carrick had actual intent to defraud his creditors or that any of the conveyances rendered him insolvent. That decision was subsequently affirmed on appeal.

At some point during the pendency of the original case, information arose regarding a certificate of deposit at the First National Bank in Shelbyville, Tennessee.² The certificate of deposit, in the amount of \$37,254.02, was a joint account, held in the names of H.W. Carrick and/or Tony Carrick. On March, 8, 1984, Tony Carrick cashed the certificate and used the funds for the construction of a home on land previously conveyed to him by his father.

On June 3, 1994, almost two years after the original complaint was filed, the plaintiffs moved to amend the complaint to allege that the transfer of funds from the certificate of deposit rendered the estate insolvent. The trial court denied the motion to amend, and the Court of Appeals affirmed that aspect of the trial court's ruling, stating:

It appears that, during the trial, the existence of the certificate of deposit was considered relevant only on the question of whether deceased was rendered insolvent by the conveyances of real estate mentioned in the complaint. The effort to charge the defendant with conversion of the certificate of deposit to his own use came as an afterthought six months later.

Bush v. Carrick, 1995 WL 681181 (Tenn. Ct. App., Nov. 17, 1995).

The complaint giving rise to the present appeal alleged that the proceeds of the certificate of deposit had been fraudulently conveyed to Tony Carrick and that the transfer of those funds had rendered Harvey Carrick's estate insolvent. A motion for summary judgment was filed on behalf of Tony Carrick and granted by the trial court on July 12, 1996. That decision was appealed to the Tennessee Court of Appeals for the Middle Section of Tennessee. The court of appeals, on April 30, 1997, vacated the order of the trial court granting Tony Carrick's motion for summary judgment

¹ The services alleged to have been performed can be characterized as general housekeeping chores.

² It appears that the information arose during a supplemental deposition of Tony Carrick taken on March, 3, 1994.

and remanded the case to the trial court. Bush v. Carrick, 1997 WL 210863 (Tenn. Ct. App., April 30, 1997).

Upon remand, the case was heard in the Chancery Court of Bedford County on May 20, 1999. The court found that the plaintiffs had not carried their burden of proof to establish that a fraudulent conveyance was made in regards to the certificate of deposit. Additionally, the court determined that the conveyance had not caused the estate to become insolvent. The trial court entered judgment for the defendant, and this appeal followed.

II. Law and Analysis

This case has a long and complex history. Our consideration of the issues presented in this appeal constitutes the third trip through the appellate process for these parties. Although the facts of the case may be complex, the resolution of the present dispute is not so. The appellant has presented four issues on appeal, but we consider all of those issues to be subsumed by the single question of whether the transfer of the funds from the certificate of deposit amounted to a fraudulent transfer.³ Since we find the answer to that question to be no, we need not delve any further.

As an initial matter, we note that there appears to be little, if any, evidence that Harvey Carrick ever had any actual intent to defraud his creditors. We believe the Appellants recognize this facts insofar as they cite to T.C.A. § 66-3-305 as the basis for finding that the conveyance at issue in the present case was fraudulent. That section provides that “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to such person's actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.” Tenn. Code. Ann. § 66-3-305. Under this section, the Appellants contend that the transfer of the proceeds from the certificate of deposit was fraudulent irrespective of Harvey Carrick’s actual intent.

While we do not necessarily disagree with the Appellants’ reading of the statute, we must disagree with the inferences the Appellants draw from the facts. The statute speaks in terms of a conveyance being fraudulent as to “creditors.” At the time the certificate of deposit was conveyed, Ms. Lane was not a creditor. Her claim for services rendered was not filed until 1987, some three years after the certificate of deposit was cashed out by Tony Carrick, and her claim was not reduced to judgment until 1991, seven years after the conveyance. As Ms. Lane was not a creditor at the time of the conveyance, we question whether T.C.A. § 66-3-305 is applicable. In this regard, we quote, with approval, the statement of the trial court:

³ The Appellants have put forth an issue regarding the question of whether Tony Carrick has made conflicting statements during the pendency of this case. We do not believe our consideration of that issue will, in any way, affect the outcome of this case. Even if we assume that Tony Carrick made statements regarding his father’s estate which turned out to be false, we are unable to conclude that these “false” statements were made with the intent to defraud, as opposed to being mere mistakes deriving from a lack of knowledge.

I don't believe there was a clear probable liability as to what he had or what he owed, nor was this an existing debt at the time of the transfer, nor does it appear that there was any indication that there would be a claim or a debt so that there wasn't any intent or belief on his part that debts would accrue so he could transfer these properties to keep them out of the hands of creditors.

We recognize that T.C.A. § 66-3-307 applies to future creditors. However, that section requires that the transferor have an intent or belief that future debts will exceed the transferor's ability. Even if we were to assume, *arguendo*, that Harvey Carrick was aware of the debt to Ms. Lane, the Appellants have made no showing of the requisite intent or belief on the part of Harvey Carrick so as to make T.C.A. § 66-3-307 applicable.

Pursuant to T.C.A. § 66-3-302, the test for insolvency is whether "the present fair salable value of the person's assets is less than the amount that will be required to pay the probable liability on such person's existing debts as they become absolute and matured." There is evidence in the record that Harvey Carrick had other assets at the time of the conveyance at issue, including another certificate of deposit with a principal balance of approximately \$20,000. Therefore, the Appellants have not shown that Harvey Carrick became insolvent due to the conveyance presently at issue. Having failed in that regard, we believe the trial court was correct in concluding that the Appellants failed to carry their burden of proof.

Finally, the Appellee has asked us to declare that this appeal is frivolous and award damages pursuant to T.C.A. § 27-1-122. We are unable to say that this appeal was undertaken for any reason which would support our finding it to be frivolous. We are also unable to say that the Appellants' arguments were totally devoid of merit. While the trial court's decision was ultimately the correct one, that fact is not sufficient to render the appeal frivolous.

Conclusion

For the aforementioned reasons, we affirm the trial court decision. Costs of this appeal are taxed to the Appellants, Ewin Bush and William Gibson, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE